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No. 85-1292

In the Supreme Court of the United States

OCTOBER TERM, 1985

M.C.C. OF FLORIDA, INC. AND
MICHAEL CONSTRUCTION CO., PETITIONERS

v.

UNITED STATES OF AMERICA AND FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantees a jury trial to an alleged violator of the Clean Water Act and Rivers and Harbors Act in an action brought by the United States seeking injunctive relief, mitigation, restoration of damaged seabed, and civil penalties.

2. Whether petitioners violated the Rivers and Harbors Act and Clean Water Act when their vessels' propellers destroyed sea grass, deposited bottom sediment on adjacent sea grass beds, and dredged channels in the sea bottom.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 772 F.2d 1501. The decisions of the district court (Pet. App. 17a-28a, 29a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1985. A petition for rehearing was de-

nied on November 13, 1985 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on January 30, 1986. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, the United States brought an action against petitioners under the Rivers and Harbors Act, 33 U.S.C. 401 *et seq.*, and the Clean Water Act, 33 U.S.C. 1251 *et seq.* The government, seeking injunctive and other equitable relief, alleged that the propellers of petitioners' vessels had, in making contact with the bottom of Niles Channel in southern Florida,[1] vertically cut into the bottom sediments, damaging the fertile grass bed area, causing permanent trenching or scarring, diminishing the water quality due to turbidity, destroying the spawning areas of fish and wildlife, and depositing bottom sediment on adjacent sea grass beds. Petitioners were charged with violating Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, which prohibits, inter alia, the unauthorized "creation of any obstruction * * * to the navigable capacity of any of the waters of the United States," as well as unauthorized excavating or filling which "alter[s] or modif[ies] the course, location, condition, or capacity of * * * the channel of any navigable water of the United States." Petitioners were also charged with violating Section 301 of the Clean Water Act, 33 U.S.C. 1311, which prohibits the discharge of any pollutant into the waters of the United States from any point source.

[1] Niles Channel carries a designation under state law as an "outstanding Florida Water." Such a designation requires special environmental protection for an area. U.S. C.A. Br. 27 n.21.

Dredged spoil, sand, and biological materials are listed in the Act as "pollutants" (33 U.S.C. 1362(6)), and a "point source" includes a "vessel or other floating craft" (33 U.S.C. 1362(14)).[2]

2. a. The district court denied petitioners' request for a jury trial (Pet. App. 14a-16a). After a bench trial, the district court held that petitioners had violated both the Rivers and Harbors Act and the Clean Water Act because the propellers of their vessels had uprooted sea grasses on the bed of Niles Channel and had redeposited the dredged materials on adjacent areas (*id.* at 25a-27a). The court found damage to one of the two sites at issue "dev[a]stating" and, to the second site, "extensive and significant" (*id.* at 24a).

The district court reserved ruling on the issues of restoration of the damaged sites and civil penalties in order to permit the parties an opportunity to study restoration alternatives. The United States submitted two alternate plans for restoring the damaged sites; petitioners submitted none (Pet. App. 4a, 12a, 30a). The district court rejected the government's proposed restoration plans on the basis of cost and insufficient guarantee of success (*id.* at 37a-38a). In lieu of adopting either of the two plans, the district court ordered petitioners to pay the United States $200,000 to be used for restoration of sea grass beds in south Florida under a plan approved by the court and assessed a $20,000 penalty (*id.* at 40a).

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[2] The district court declined to issue a preliminary injunction, but imposed conditions on petitioners' continued use of Niles Channel, requiring, among other things, that petitioners' vessels travel with lighter loads and at high tides (Pet. App. 22a-23a). At trial, the court found that petitioners had failed to comply with these conditions (*id.* at 23a).

b. The court of appeals affirmed (Pet. App. 1a-13a). It carefully analyzed the Rivers and Harbors Act and Clean Water Act (*id.* at 5a-10a), pointed out that the district court had found petitioners' behavior to be " 'illegal and willful' " (*id.* at 7a), and concluded that petitioners had violated both statutes. The court also rejected petitioners' argument that the district court had erred in striking petitioners' demand for a jury trial (*id.* at 10a-11a), finding that the issues under both statutes "were equitable in nature" (*id.* at 11a). While agreeing with the district court's findings that the government's proposed plans were expensive and speculative, the court of appeals reversed the district court's requirement that petitioners pay $200,000 without any specific restoration plan; it remanded so that the district court could order petitioners to submit an alternative plan (*id.* at 12a-13a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[3] Accordingly, further review is not warranted.

1. The first question presented in this case is similar to the first question presented in *Tull* v. *United States*, petition for cert. pending, No. 85-1259.[4] In both cases, petitioners have claimed entitlement to a jury trial in actions brought by the United States to enforce the Clean Water Act and Rivers and Harbors Act. Indeed, the court of appeals here (Pet.

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[3] No explicit assertion of a conflict in the courts of appeals is made on either question presented.

[4] Petitioners in each case will be sent both briefs in opposition.

App. 11a-12a n.3) "incorporate[d] the reasoning * * * in *Tull* [769 F.2d 182 (4th Cir. 1985)] as further authority for our conclusion on the jury trial issue." Both decisions are entirely correct, and there are no court of appeals or district court decisions to the contrary.[5]

Petitioners here have a slightly better basis for their claim to a jury trial than does the petitioner in *Tull*. Here, at least, there were disputed questions of fact that might have been submitted to a jury; in *Tull*, we pointed out that "there was no function for the jury to perform" (Br. in Opp. 8). Nonetheless, in neither case was there any legal (rather than equitable) issue and, therefore, there is no Seventh Amendment right implicated in either.[6] See *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446-447 (1830). The court of appeals correctly held (Pet. App. 11a (footnote omitted)) that "[i]t is clear that both the Clean Water Act and River and Harbor Act issues were equitable in nature. Therefore, [petitioners were] not entitled to a jury trial." The mere circum-

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[5] The district courts that have considered the issue have also held that there is no right to a jury trial in a Clean Water Act enforcement action. See, *e.g.*, *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830, 839-840 n.13 (E.D. Pa. 1977), aff'd *sub nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978) (33 U.S.C. 1321); *United States* v. *Lambert*, 19 Env't Rep. Cas. (BNA) 1055 (M.D. Fla. 1983) (33 U.S.C. 1319).

[6] The lack of any legal (rather than equitable) issue in this case makes it unnecessary to resolve whether there is ever a jury trial right in a civil case with the government. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449-450 n.6 (1977).

stance that there are issues of fact for the court to resolve does not, of course, convert an equitable proceeding into a legal one (or confer a right to a jury trial into a suit in equity).

The right to a jury trial attaches only when "the action involves rights and remedies of the sort traditionally enforced in an action at law" (*Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974)). It is clear that, in designing the complex remedial scheme at issue here, Congress was creating rights and remedies greatly different not only in degree but also in kind from those that existed at common law. Cf. *Thomas* v. *Union Carbide Agricultural Prods. Co.*, No. 84-497 (July 1, 1985), slip op. 13-23; *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981).

Moreover, in *Ross* v. *Bernhard*, 396 U.S. 531, 538 n.10 (1970), this Court stated:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.

Not only does the action here fail the first test, it fails the two others as well. Neither liability nor remedial issues could have their "jury" and "judge" components teased apart in the civil enforcement actions brought under these statutes. Thus, as discussed below, the liability issues presented were beyond the jury's "practical abilities and limitations" and the remedy sought was an equitable one.

Indeed, the factual issues in this case were entirely mixed with questions of law. The trial here focused largely on the question whether a statutory violation occurred when petitioners' propellers dredged the waterbed and redeposited the bottom

material on adjacent sea grass beds. Similarly, in *Tull* it was on whether the areas filled were "wetlands." These were "primarily [questions] of regulatory and statutory interpretation" (*United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 4), and were thus for a court, not a jury, to decide.

The remedies in these cases, moreover, are solely equitable. As this Court held in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 316 (1982), a district court in a Clean Water Act proceeding is called upon to exercise its "traditional equitable discretion in enforcing the statute." Such discretion should result in an order "that will achieve *compliance* with the Act" (*id.* at 318 (emphasis in original)). The equitable nature of the remedies is especially apparent in 33 U.S.C. 1319 and 406, the provisions, respectively, of the Clean Water Act and the Rivers and Harbors Act which were involved here. As we have explained in more detail in our response in *Tull* (at 7-8), the civil penalties, no less than the other relief provided, were equitable in nature.

Moreover, the civil penalty in this case was part of an overall remedial plan which included mitigation and restoration.[7] Specifically, the district court ordered petitioners to pay $200,000 to be used "for restoration of seagrass beds in south Florida under a plan to be approved by the Court" (Pet. App. 40a) and the court of appeals remanded "for the purpose of * * * requiring [petitioners] to prepare and submit a substitute environmental plan together with estimated costs" (*id.* at 13a). As the court of ap-

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[7] The government sought injunctive relief as well (Pet. App. 3a).

peals in *Tull* explained (769 F.2d at 187 (footnote omitted)):

> [T]he assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of remedies, one part of the package affecting assessment of the others. This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence.

Petitioners do not appear to argue—and surely they would not—that a jury would formulate any part of the package except civil penalties. But the package's coherence would be lost if one part were formulated by the jury and the rest by the court. In sum, the remedies sought and guaranteed in this case in particular, and under the Clean Water Act and Rivers and Harbors Act generally, are equitable.

2. Petitioners also urge review by this Court of the findings by two lower courts that they had violated both the Rivers and Harbors Act and the Clean Water Act. Since violation of either Act independently supports the remedy awarded, petitioners have the burden of showing that both statutes have been misapplied. They assert that their vessels were simply "navigating" (Pet. 17) and that Congress never intended either of the two statutes to preclude the activities found illegal. Neither assertion is correct.

a. Petitioners characterize the effect of the decision in this case as empowering the Corps of Engineers "to prevent petitioners from navigating" (Pet. 17) and "to halt shipping * * * wherever navigation results in bottom roiling or bottom contact" (*id.* at 19). But petitioners' vessels were found to have done a great deal more than merely navigating or making

incidental contact with the bottom of Niles Channel. The district court found that the propellers of petitioners' vessels had been observed uprooting and destroying sea grass and depositing the bottom sediment on adjacent sea grass beds (Pet. App. 23a) and had also, "on at least three occasions, caused turbidity over an extensive area well in excess of fifty Jackson Units above the natural functioning of the marine eco-system" (*ibid.*). Petitioners' vessels were found to have been largely responsible for a propeller-dredged channel approximately 2,000 feet long and ranging from 50 to 200 feet wide (*id.* at 30a). Petitioners' violations of the pollution and environmental laws were found to be willful (*id.* at 38a). All this goes beyond simply "navigating."

b. Petitioners are correct in stating that Congress enacted the Rivers and Harbors Act to enhance navigation (Pet. 18). Petitioners also urge the Court, however, to adopt an interpretation of Section 10 which, in light of their "devastating" and destructive actions, would be a "narrow, cramped reading" of the statute (*United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491 (1960)) and would fail to draw a distinction between de minimis and flagrant violations. The court of appeals correctly rejected this narrow reading of Section 10 in finding that the first clause of Section 10 had been violated, and went on to find that, in any event, petitioners had violated the third clause of Section 10 as well (Pet. App. 7a):

> Repeatedly going back and forth across the subject areas with equipment that is dredging a channel and dumping the spoil on the adjacent sea grass beds clearly fits within the plain language of the third clause of Section 10. The fact

> that the equipment used was the propellers of a tug is immaterial. [Petitioners] knew that [their] activities were dredging a channel and filling the adjacent areas.

This factbound finding is correct and does not merit further review.

In also urging the inapplicability of the Clean Water Act, petitioners assert that the "mere use of the bed of navigable waters" (Pet. 19) is not an unlawful discharge of a pollutant or the addition of dredged material into waters of the United States. But, once again, petitioners' activities were hardly of the de minimis sort they assert them to be. Moreover, petitioners' discussion of the Clean Water Act disregards the fact that the 1972 amendments to the Act represented "a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' " (*Riverside Bayview Homes, Inc.*, slip op. 10 (quoting 33 U.S.C. 1251)). Thus, in asserting that its vessels added nothing to the waters of Niles Channel (Pet. 19), petitioners ignore the fact that, as noted by the court of appeals, the word "addition" as used in defining "discharge" " 'may reasonably be understood to include "redeposit" ' " (Pet. App. 10a, quoting *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923 (5th Cir. 1983)). That redeposit "clearly disturb[ed] the 'physical and biological integrity' of the subject areas" (Pet. App. 10a (quoting 33 U.S.C. 1251)), in contravention of Congress's mandate. Petitioners cite no authority to the contrary.

Petitioners conclude by asserting that "[t]he holdings below grant to the Corps of Engineers a vast expansion of its power and jurisdiction, which may

be arbitrarily exercised about the country" (Pet. 20). This Court has, however, recently acknowledged "the breadth of federal regulatory authority contemplated by the [Clean Water] Act itself" (*Riverside Bayview Homes, Inc.*, slip. op. 12) and that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress" (*id.* at 9). Moreover, petitioners' claim that the government has shown a propensity to abuse its regulatory authority in this case is far-fetched. Both the district court and the court of appeals found, as a factual matter, that petitioners' vessels had repeatedly gone back and forth through Niles Channel, dredging a channel and filling adjacent areas. This finding is not seriously disputed, and this Court has, of course, repeatedly expressed its reluctance to review factual findings concurred in by two lower courts. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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